

SIXTH CIRCUIT REVIEW

Closing the Polls: *Mays v. LaRose*

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The coronavirus pandemic has disrupted lives and wreaked havoc across the globe. These disruptions have changed the way we move about in our world, profoundly affecting our daily activities and interactions with family and friends. Ohio Governor Mike DeWine, assisted by Director of Health for the Ohio Department of Health Dr. Amy Acton, has issued a series of [public health orders](#) intended to protect Ohioans from contracting coronavirus. Issuing these orders can help “[flatten the curve](#)” to prevent deaths and overwhelming the health care system.

One such public health order, issued by Dr. Acton, was to call for the [closure of the polls on March 17, 2020](#). This final closure, issued in the eleventh hour and [approved by the Ohio Supreme Court](#) in the early morning on that Tuesday, was preceded by a chaotic few hours. In the 24 hours before Election Day, it was unclear whether the polls would remain [open or closed](#). The hectic period looked like this: Governor DeWine stated that the polls should close; plaintiffs argued in a lawsuit that holding the primary on March 17 [disenfranchised them](#) and requested a delay; [Franklin County Judge Richard Frye rejected that request](#), allowing the polls to remain open; Dr. Acton ordered the polls closed; more lawsuits were filed contesting the poll closures; and finally, the Ohio Supreme Court upheld the closure of the polls.

More lawsuits have been filed since. In particular, the [Ohio Democratic Party](#) filed to create an absentee-ballot-only election, to be held on or before April 28, 2020, with ballots received on or before May 8, 2020. Pushing against absentee-ballot elections, the Ohio Secretary of State and the Governor advocated for a [June 2 in-person primary](#). The Ohio General Assembly favored the absentee voting option and passed H.B. 197, which set [April 28](#) as the vote-by-mail election day, limiting in-person voting only to persons with disabilities and those who do not have a home mailing address. This crisis and the various resulting lawsuits demonstrate the conflicting tensions of maintaining the democratic process while protecting public health.

But it's not just Ohio state courts that have been wrestling with questions surrounding voting rights and absentee ballots. In [Mays v. LaRose](#), 951 F.3d 775 (6th Cir. 2020), the Sixth Circuit addressed the last-minute exceptions available to absentee-ballot electors. Ohio has

generous absentee voting laws, which allow for any elector to vote by mail for “any reason or no reason at all,” as long as they request an absentee ballot by noon three days prior to Election Day. *Id.* at 780. There is one exception to this rule: if an elector is unexpectedly hospitalized just before Election Day, that person may request an absentee ballot up until 3:00 p.m. on Election Day itself. *Id.*; see also Ohio Rev. Code Ann. §§ 3509.02, 3509.03 (2012).

The plaintiffs in *Mays* were not unexpectedly confined to a hospital, but they were unexpectedly confined just before Election Day 2018—both plaintiffs were arrested the weekend before Election Day. *Mays*, 951 F.3d at 780. The plaintiffs argued that this confinement by the State and subsequent failure to provide absentee ballots because of this unexpected confinement robbed Tommy Mays and his co-plaintiff Quinton Nelson of their right to vote. But was the disparate treatment between late-jailed and late-hospitalized voters sufficient to sustain an equal protection violation? The Sixth Circuit said no.

As *Mays* states, “voting is of the most fundamental significance under our constitutional structure” and “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.” *Id.* at 783 (quoting *Ill. Bd. Of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) and *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). Yet, as illustrated by Ohio’s recent postponement of the primary election and the absentee voting suit filed by the Ohio Democratic Party, “[i]t does not follow, however, that the right to vote in any manner . . . is absolute.” *Id.* (quoting *Burdick v. Takushi*, 504 U.S. 428 (1992)). The Constitution of the United States allows state legislatures the authority to regulate the “Times, Places, and Manner of holding Elections.” *Id.* (quoting U.S. Const. art. 1, § 4, cl. 1). But even so, within these regulations, the states must be careful not to place undue burdens on the right to vote—in other words, they may not discriminate against an elector when regulating the right to vote. *Id.*

Here, the Sixth Circuit deemed that not allowing absentee voting from jail only placed a moderate burden on the plaintiffs’ rights to vote, and as such, was still within the State’s authority as provided by the Constitution. *Id.* at 786. Indeed, it was Ohio’s “generosity” in extending absentee voting privileges that allowed the plaintiffs to challenge those provisions in this case. *Id.* Even so, however, this generosity cut against the plaintiffs’ case, as Ohio has provided a “consistent and laudable state policy of adding . . . groups to the absentee [ballot] coverage.” *Id.* at 791 (quoting *McDonald v. Bd. Of Election Comm’rs of Chicago*, 394 U.S. at 810–11 (1969)). With that, the Sixth Circuit ruled in favor of the Ohio Secretary of State. *Id.*

But this case highlights another point that may be important to some Ohioans as more and more people fall ill from coronavirus: if you are suddenly hospitalized in the days before the election—whether the primary on April 28, or the presidential election in November—you have until 3:00 p.m. that day to file a request for an absentee ballot. But, as *Mays* demonstrates, if you are otherwise confined . . . well, then, you are out of luck.